UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In Re: Bair Hugger Forced Air Warming Devices Products Liability Litigation	File No. 15-MD-2666 (JNE/FLN)
	December 15, 2016
	Minneapolis, Minnesota
	Courtroom 12W
	9:45 a.m.

BEFORE THE HONORABLE JOAN N. ERICKSEN
UNITED STATES DISTRICT COURT JUDGE

THE HONORABLE FRANKLIN D. NOEL
UNITED STATES MAGISTRATE JUDGE

(STATUS CONFERENCE)

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P R O C E E D I N G S

(9:45 a.m.)

THE COURT: Good morning. Please be seated. Welcome to Minnesota. It's minus 2.

All right. We have your appearances. Are the people on the telephone?

THE CLERK: They should be able to hear and talk.

THE COURT: Okay. And talk? All right, somebody on the phone say something?

UNIDENTIFIED VOICE: Good morning, Your Honor.

THE COURT: Okay.

MAGISTRATE JUDGE NOEL: Thank you.

THE COURT: All right. I think I know what we're going to be spending most of our time talking about this morning, but we'll go through the joint agenda. Someone is missing on your side.

MR. HULSE: Mr. Blackwell is.

THE COURT: Oh, right, doesn't he have some kind of anniversary?

MR. HULSE: Yes, he's got a trip to Saint Kitts.

THE COURT: Some kind of romantic thing. All right. Well, plaintiffs will try and take advantage of you.

MR. HULSE: We're ready for it.

THE COURT: Okay. There's nothing to say about the pretrial order.

The plaintiff fact sheets? Anything to say about that?

MS. ZIMMERMAN: Good morning, Your Honors. With respect to the plaintiff fact sheets, I think that we have a near agreement. The plaintiffs have proposed that the service protocol be done through an FTP website, which is how we have done all other productions thus far in this case, wherein the defendants are provided a log-in and a password and then they will then get an e-mail every time a plaintiff fact sheet is uploaded. I believe that we have basic agreement, but we're waiting for final confirmation for 3M with respect to that proposal.

THE COURT: Ms. Young?

MS. YOUNG: Yes, Your Honor, we expect to be able to reach an agreement. And we were also proposed just yesterday the Ramsey County plaintiff fact sheet, and we just do have one concern because it requires a due date within 45 days of entry of that order, and how we'll put that cases into the bellwether pool as contemplated in PTO-15, if they're not due until early February.

THE COURT: Well, they might have to be separate then. We might have to just pick a few.

MS. YOUNG: Okay.

THE COURT: Anyway, we won't let that hold up the whole process of selecting the bellwethers. And Judge Leary

is not here, so we can't do much about that.

Okay. Plaintiffs' additional statement.

MAGISTRATE JUDGE NOEL: This is bellwhether. There is nothing to say about that.

THE COURT: Nothing to say, yeah.

MAGISTRATE JUDGE NOEL: I think you may have skipped a page.

THE COURT: Oh, yes, that's why it didn't make any sense. The foreign discovery?

MS. ZIMMERMAN: Thank you, Your Honor. And I think that some of the relevant facts have been outlined for the Court in our submission, but just for completeness of Your Honors' information, we did want to take at least a somewhat brief journey through what has happened with respect to the United Kingdom depositions.

The plaintiffs have cooperated at every angle at every turn with allowing the defendants to go forward with this discovery that we really didn't think was necessary of these UK authors. And as you know, there was letters rogatory that were submitted for Your Honor's review and signature, and they were presented to the High Court in the United Kingdom. Those were eventually signed somewhere around about November 8th.

We did have one aborted trip, I guess, to the United Kingdom back in September. There were the four

depositions that were supposed to go forward. One was cancelled by 3M, the others were cancelled by the witnesses. And during that trip, we were scheduled to be deposing Dr. McGovern then as well. And as the Court is certainly aware, we returned and no depositions were taken in September.

We then went forward. We had the United Kingdom issue the order on I think the 8th of November. The plaintiffs again throughout the process have really said we're not going to stand in your way, so long as we're provided equal access, we're provided copies of communications with any of those solicitors or barristers or the witnesses that were included in all of this, that we share equally in time, and we were expected to share equally in costs.

Unfortunately, we learned over the course of the last month that that has not been the case. We have not been copied on the communications. We have not been copied on orders that have been submitted to the High Court for signature. We learned when we got to Manchester in the United Kingdom to take the first deposition of Mr. Legg that the orders that had been prepared by 3M and submitted and ultimately sealed by the High Court were actually a departure from what is typically done in a very atypical process.

As I think you know, depositions are not typically done in the United Kingdom the same way that they are done here, but we were informed by the examiner, who is as I guess I would say the referee for the process, that there was some atypical language wherein the plaintiffs were denied equal access in terms of time. And we were also denied the ability to cross examine the witness. And these were departures from a standard order as we were advised by the examiner. He said he's done a couple hundred of these. He's never seen this kind of language in these orders, and they were orders prepared and drafted by 3M.

We brought that issue to the examiner's attention. The examiner noted the discrepancy from standard protocol and said that he did not have authority to overrule the Court, but did say that this was inconsistent with certainly the process in the UK and his understanding of American law as well. And so we had an emergency hearing, a telephone hearing before the High Court and Senior Master Fontaine actually appeared, perhaps without a license, on the phone with Senior Master Fontaine to outline our issues. And, ultimately, Senior Master Fontaine agreed that this was a departure from general practice and issued new sealed orders, and ordered that 3M pay the study authors both additional time for sitting there. This was a six hour delay in Manchester where we all waited to get this sorted

out. They had to pay the barrister and the solicitor their additional time for being involved.

So the deposition then of Mr. Legg went forward, and we were informed that in the UK when you become a surgeon, you're not a doctor anymore, you're a mister, so I guess that's a promotion. But so Mr. Legg's deposition went forward. We traveled down to London. We conducted back to back depositions on Sunday of Mr. Hamer and Mr. Reed. We learned in the course of that discovery that Mr. Reed was really the primary author on the main McGovern studies that have been the subject to some discussion before the Court throughout the course of this MDL.

We had a deposition later that week of Professor Leaper, and then we were scheduled to have the deposition of Dr. McGovern on Friday. I concluded the questioning of Professor Leaper around 4:00 on Thursday, and we were advised around about 5:45 that Mr. Gordon, Mr. Corey Gordon had a sudden onset illness, and he was going to be postponing the deposition of Dr. McGovern set for the following day. We, and I should also say that about 36 hours before the start of the deposition, we were presented with around about 10 three-inch binders full of materials from Dr. McGovern along with a flash drive with 45 videos, so we were seeing these for the first time. And I trust that the defense counsel was also seeing this for the first

time. And so we stayed up, we prepared for these depositions and expected them to go forward and then they were postponed. We hoped to try to get it rescheduled while were all in the UK given this was our second trip, and this is a significant expenditure of both time and resources for all parties involved, and our requests were flatly rejected.

They have now over our objection rescheduled this deposition to happen in the first week of January, after already being advised that those were dates that were not going to work for the plaintiffs' side given long standing travel that had been arranged last April.

And so at this point the plaintiffs would request, first of all, that it is not necessary that we go all the way back over to the United Kingdom to have Dr. McGovern's deposition taken. And we would request that to the extent that the defendants continue to seek the testimony of Dr. McGovern, that they make a proffer to this Court about what they expect to learn that would be different from the discovery that they have already conducted on the authors of the various studies.

We have already deposed Dr. Nachsheim here in Minneapolis. Mr. Albrecht has already been deposed. Dr. Reed or Mr. Reed has been deposed. While his name appears not as the first listed author, he is the main author, according to his testimony, and according to the e-mails

that we have now received from Dr. McGovern. And so we -- and then Dr. Augustine also will be scheduled for deposition I believe on January 9th.

So from the plaintiffs' perspective, the defendants have come in and said to this Court that this is some sort of -- that all of these studies are some sort of Dr. Augustine conspiracy, that all of the authors are somehow financially tied to Dr. Augustine and his company, and/or that the science behind the relative risk of 3.8 in the McGovern and Reed study is somehow unreliable.

Well, the, testimony that they have received in depositions both in the United Kingdom and here in the United States is not consistent with that. That is not what these witnesses have testified, and the plaintiffs would gladly offer the deposition transcripts from these witnesses for the Court to review. But at this point, we would request that the defendants make a proffer about what additional information they expect to learn from this witness that justifies a third trip across the Atlantic Ocean to depose Dr. McGovern.

We just think that at this point it is unduly burdensome and, alternatively, perhaps given that the defense counsel had arranged to pay Dr. McGovern and his lawyers $50,000 in connection with his testimony that was scheduled and then cancelled last week, that perhaps the

more efficient approach if this is to go forward is to have Dr. McGovern and his lawyers flown to the United States rather than having a team of lawyers from here fly over for a third time.

So I think that that is at least a brief explanation of some of the issues that came up as we were in the United Kingdom last week and returned on Saturday, and we appreciate having the opportunity to update the Court on that.

THE COURT: Mr. Hulse.

MR. HULSE: Good morning, Your Honors, first off, Corey Gordon can't be here today to address this because he is still in the hospital. He developed a fever shortly before the McGovern deposition. He was put on bed rest. He did come back to the United States on Monday, but then shortly thereafter was admitted to hospital where last I heard last night he remains.

And so there was no question with Mr. Gordon being the only 3M of the U.S. counsel there that it couldn't proceed, and it certainly wouldn't have been able to proceed while the counsel were over there given his serious health condition.

Dr. McGovern's counsel, who we've worked with on securing his voluntary appearance, offered the dates of January 4th through 6th as the next available option for him

to be deposed. Those are the only available dates that they have in January before the discovery cut-off. They have offered also to present Dr. McGovern for two full days so that each of the parties can have a full day of examination.

As to the importance of Dr. McGovern, I don't think that really is something that is worthy of further discussion. On the very first appearance that was made by plaintiffs' counsel before this Court when the issue of general causation came up, plaintiffs' counsel handed up and delivered the Court a copy of the McGovern study and said this is what was established in general causation. He is true one of several authors. Dr. Reed is also an author too, but he is a vitally important person to the litigation.

What we have suggested to plaintiffs, if they don't want to make another trip over there, is that we can set up for them to participate by video as is often done with overseas depositions. We can certainly make that accommodation. But, basically, at this point, we have a very important deposition. We have been, contrary to plaintiffs' counsel's statements, establishing conclusively the ties between these study authors and Dr. Augustine and his surrogates as we expected to do, and Dr. McGovern, the deposition of Dr. McGovern will continue that.

What we don't understand is why on four weeks of notice the plaintiffs cannot identify a single member of

their team, and I note that there are several counsel present here, who can do this deposition on December 4th, 5h, or 6th.

THE COURT: January.

MR. HULSE: I'm sorry, yes, Your Honor. January 4th, 5th, 6th. We don't think any further proffer is needed. We think we should just proceed on those dates, and plaintiff should identify somebody who can take the deposition whether it's overseas or by video conference.

THE COURT: Okay. We're going to come back to that. We'll go through the remaining matters on the agenda here.

Cases? Almost to a thousand? Like the stocks going almost to?

MR. SZERLAG: Good morning, Your Honor.

THE COURT: The psychological emotional barrier, is it?

MR. SZERLAG: Currently in the MDL, we have 961 cases that are on file. I think in the agenda in the joint report, there are still a number of state court cases. I believe there were four or five in state court. I'm sorry, five that are filed in State Courts other than Ramsey County, and I believe the Ramsey County still stands at 45.

THE COURT: And it doesn't look like anything is happening in the non-Ramsey State cases that we have to be

concerned about at this point?

MR. SZERLAG: That seems to be the case. Yes, Your Honor.

THE COURT: Okay. And same anything with Canada?

MR. SZERLAG: Canada, I -- it doesn't appear that anything has happened, and I have to say I think that information was provided by defense counsel.

THE COURT: All right. Ms. Young?

MS. YOUNG: Your Honor, just two brief points on the state court case. One is the Patita case filed in Hidalgo County, Texas. Those claims are joined with medical malpractice claims, include a Bair Hugger claim, and it is duplicative of a previously filed MDL claim. And I spoke with plaintiffs' state court counsel last week, and he related, his assistant related to me that he's having trouble getting in touch with MDL Counsel so that they can resolve the duplicate filing and whether his federal case or his state case would go forward. So that is one we just would like to have resolved by the two plaintiffs' counsel that are involved in that case. The federal case was filed first, and I believe it's Mr. Gordon's firm that is on that file.

And then second, just last week 3M received a city of St. Louis, Missouri, case that names 52 plaintiffs and joining their Bair Hugger claims together. 3M's initial

reaction to that Complaint is that it's an issue of fraudulent joinder. There's one Minnesota plaintiff, and 13 Missouri plaintiffs, and then plaintiffs from a wide variety of cases. We understand that jurisdiction is a place where joinder is done to defeat diversity jurisdiction, so we are looking into all of our options and intend to pursue removal and transfer to the MDL.

THE COURT: Okay. We'll just have to wait on that then. Isn't that funny that the plaintiff in the Texas case doesn't know who he or she is represented by?

MS. YOUNG: I would probably have to ask Mr. Gordon that.

MR. GORDON: Your Honor, we haven't heard from -- are you talking about the Martinez firm? Garcia Martinez, isn't that the case?

MS. YOUNG: I e-mailed a couple times all counsel, and the last e-mail I did speak with state court counsel last Friday. His assistant said we understand the issue. We're trying to get a call back from MDL counsel. Perhaps, he's reaching out to the wrong --

MR. GORDON: Yeah, it must be, because I've seen the e-mails, but I haven't received any phone calls or messages. I don't think any of us have from that law firm.

MR. SZERLAG: I'll reach out to them. I have not heard anything from them.

THE COURT: You'll liaise with them.

MR. GORDON: You'll liaise. Thank you, Judge.

MS. YOUNG: Okay, thank you.

THE COURT: Thank you. All right, discovery?

MR. HULSE: Your Honors, just briefly on Dr. Augustine and the motion that we had. We have received the first two installments that were due from Dr. Augustine, the two declarations that were ordered. We believe that they are not consistent with the Court's Orders. There's the document production that's forthcoming on the 20th. It's our expectation that will probably not be in compliance either, so we expect that we will be bringing a further motion based on the Court's prior discovery motion within this month.

I don't know that there's anything to spend much time on here other than the predictive coding issue, which I'm happy to address first.

THE COURT: Why don't we move to that?

MR. HULSE: So, and this has been of course an ongoing discussion between us and plaintiffs' counsel. The basic result having gone through five rounds of training on the predictive coding is that at the recall rate that we've been targeting, which is 80 percent, we cannot achieve an acceptable precision rate. And precision is basically the number that tells you of the documents that have been

identified as relevant by the system, what percentage of them are actually relevant? And so we are stuck after multiple trainings at a precision rate that's roughly 20 percent.

The prior predictive coding that was done for the Walton and Johnson cases ended up with a precision that was far higher than that. But in that case, 3M and its counsel trained on their own. We were basically able to be very focused on telling the system what was relevant.

Here, we used a random set and applied broad relevance criteria, and the bottom line is that the computer cannot figure out a good rule for determining what is and is not relevant.

So the approach that we are taking to this is that there is another criterion that predictive, that predictive coding uses, which is called threshold, which is essentially rates the relevance of documents in the pool. And so up to, you know, a hundred percent likelihood that the document is going to be relevant.

And so what we have told plaintiffs' counsel that we intend to do is take the top two tiers of documents on that relevance ranking, which is over 200,000 documents, which is consistent with a number that we believe based on our training is going to be actually relevant, and we are accelerating them for production over the next several

weeks, and that review is underway.

Our proposal for the remainder of the documents given the low precision rating here is to apply a set of key words and other screening criteria to get directly at the documents most likely to be relevant.

I want to reiterate that we have produced a large quantity of e-mail already in the case both through the prior use of predictive coding and through the use of key words, and plaintiffs have been able to use those e-mails throughout. And it remains our expectation that overwhelmingly what would be produced through the remainder of this process by the close of discovery is going to be of minimal relevance, and so, and we continue to believe that we will be able to accomplish this so long as we can proceed along with the plan I've outlined by the close of fact discovery.

THE COURT: What do you think should happen?

MR. HULSE: I'm sorry, Your Honor?

THE COURT: What do you propose?

MR. HULSE: So what we propose is that we proceed as I've just outlined and have shared with plaintiffs' counsel. And if plaintiffs reach the conclusion at the close of fact discovery that based on documents that have come in in January, that there is additional discovery that they need to take or that they need to do re-deposition of

witnesses, that they should make a showing on that, and we will cooperate with them based on the showing that they make.

But, of course, we recognize that there's going to be a substantial quantity of e-mails that are still produced in January.

MAGISTRATE JUDGE NOEL: So what -- I guess I'm not sure I'm following exactly what is your plan for getting to this?

MR. HULSE: So our plan is we take the 200,000 e-mails that our system tells us are the most likely to be relevant, and we have got those prioritized for review and production. For the remainder, what we propose to do is apply key words and other screening criteria to identify the relevant documents within that group because we know that they, that group, even though the system has flagged them as particularly relevant, we know from the training that they are in fact likely to be 80 to 90 percent nonrelevant.

It's just that the system after all of this training cannot figure out a good rule for deciding what is and is not a relevant e-mail. And, again, we were able to achieve in the predictive coding that was done in Walton and Johnson, an acceptable precision rate by this point, and we couldn't accomplish it here.

THE COURT: Okay. Do you have a 502 Order in your

protective order?

MAGISTRATE JUDGE NOEL: A clawback thing? A Rule 502 protection for clawback of --

MR. HULSE: Yes, we do, yes.

THE COURT: Could you turn over all those 20,000, all those 200 million over to them, and let them see if they can do a better job?

MR. HULSE: Your Honors, we -- no. No, and especially given, again, that we know from the training which was done on a random set, that the relevance rate is about, is probably about 16 percent of the whole. So, obviously, Rule 26 limits discovery to relevance documents. We're talking about turning over a massive quantity of irrelevant documents, not to mention that privilege, we've got privilege too that we need to go through.

THE COURT: Which is why I asked about the 502 Order.

MR. HULSE: Right, we do, but we're talking about massive, massive quantities of privileged and irrelevant documents.

MAGISTRATE JUDGE NOEL: Okay.

THE COURT: All right.

MR. HULSE: And here's what I suggest if the Court is contemplating anything along these lines, we've had no -- this is being raised in a status report. We haven't had

motion practice on it, and we would suggest that we go to full briefing. I think it's a better use of our time to follow this plan. It's an acceptable plan. It will get at the most relevant documents within the time frame left for discovery.

MAGISTRATE JUDGE NOEL: Okay.

MR. PAREKH: Your Honors, we obviously do not have an agreement on this and what Mr. Hulse has represented, to date, 3M has produced 131,000 documents total to date. They're talking about an additional 200,000 documents just in the top 20 percent. If you look at the total number of documents that reach the recall rate of 80 percent, which was the agreed to recall rate in July between us and defendants, we're talking at least 1.2 million documents, not pages, 1.2 million additional documents, and possibly up to 1.9 million additional documents.

This is not something that we contemplated when we entered into the CAR protocol. We did not anticipate this kind of delay from 3M. And 3M only started, only started the training process in November. There was no reason for them to have waited from July to November to start this training process. All of this could have been avoided had 3M diligently pursued its training process and diligently pursued its course. We have an agreed to order that says 3M must produce documents that reach an 80 percent recall rate.

MAGISTRATE JUDGE NOEL: As I understand it, whatever they're using isn't generating it. You're not getting 80 percent, so how do you make the computer get there?

MR. PAREKH: Your Honor, we are getting 80 percent. What we're not getting is a precision rate. The CAR protocol does not have a threshold for precision. We wanted to negotiate one. Defendant said, you know, we don't need a precision threshold, as long as we have a recall threshold. So the difference between, if I may for just a moment.

THE COURT: I mean it's like having a grid with only an X axis.

MR. PAREKH: Well, you do need both, but if you have an 80 percent recall rate, that means we're already losing 20 percent of relevant documents. We're not even seeing those. What they want to do is effectively reduce that recall rate to about 20 percent. So 80 percent of the relevant documents will be missed. If they can't get their CAR to work properly, what they need to do is turn over the entire 1.9 or 1.2 million e-mails. It's not clear because of the way the data was presented which number that is that hit the 80 percent recall rate, which is the agreed to rate in the CAR protocol, and let us deal with trying to get the precision rate down for purposes of our review.

We have a robust clawback provision. They can review for privilege if they want. They don't have to. They can review for relevance if they want. They don't have to. But at this point, we're stuck, and we don't even have half the documents.

Like I said, even taking their number of 200,000 additional documents, that's more documents than they have produced to date. And they're saying that they can only get those 200,000 documents produced by January 20th. That leaves us no time to review the documents, no time to analyze the documents, and no time to take depositions at the end of discovery. I mean it's just, it's just, it's not possible to do it that way.

THE COURT: Well, what do you suggest short of turning over everything?

MR. PAREKH: We're not asking them to turn over everything. Everything would be approximately 2.5 million documents. We're saying do what you said you were going to do, which is turn over all the documents that using your own system hit the 80 percent recall rate.

THE COURT: But they don't. I mean they don't have their own -- they can't reach an 80 percent recall rate.

MR. PAREKH: No, they can. They can reach an 80 percent recall rate. What they can't reach is a

precision rate that's acceptable to them. It's acceptable to us. We'll take the 17.1 percent precision rate.

THE COURT: Mr. Hulse? You can both be up there.

MR. HULSE: Let me clarify, Your Honor. And so the issue here is not that they were ever entitled under the CAR protocol to simply get everything that hits the 80 percent recall. We still are entitled to review for privilege and relevance. This is a system to get to that set.

What we agreed on is that because it's very, very difficult to achieve an 80 percent precision rate without training forever months and months and months and months of training, is that we would leave that blank and see if we could simply reach agreement on an acceptable precision.

Now, what's happened here is we've trained, and this is not, we've litigated several times here why the timing is what it is. And this is a collaborative process that the plaintiffs insisted on, and the reason we got started when we did is because of them not because of us.

But once we went through the training and following the process that was prescribed by the protocol, it simply couldn't get to a point where the system could effectively at the 80 percent recall rate distinguish garbage from non-garbage. And so what that means --

THE COURT: Let me just ask one question, and I

think Judge Noel has a question too.

Suppose you turn over what you do have even though it's not, you know, you've got the subset that meets the -- and you haven't had a chance to review it for everything else, but you work with them, those documents are all out there. You've got your clawback, you've got your 502 protection, and use that evidentiary and discovery tool to work together using that set of documents. And there will be some privilege information in there, and there will be a lot of irrelevant information because you haven't been able to narrow it down. But at least it would be, then you could work collaboratively with a universe of documents and, you know, maybe we have to bring in a discovery expert or something.

MR. HULSE: I suggest, Your Honors, there's no need for that because we already have the tools here to get where we need to go. And while there's been a lot of resistance on the other side to use of a keyword type approach, that can help us get where we want to get.

What we're struggling with here is we have an extremely broad set of relevance criteria that the parties have worked out. That means that, you know, much of what just relates to Bair Hugger in some sense gets deemed relevant. So all that we would -- there's no magic in here in all of a sudden working with the plaintiffs' counsel on

predictive coding. All we would end up doing is more training and taking more time. What makes more sense is for us to just get through these documents, get through the top tier, apply key words to the lower tier, and get those reviewed and get to them, but otherwise I think that if we try to go back and retrain collaboratively, we're just going to end up taking more time.

THE COURT: How long is it going to take you to do that?

MR. HULSE: Well, we will accomplish it by the close of discovery in the first tier.

THE COURT: What was the qualifier?

MR. HULSE: I'm sorry?

THE COURT: You said the first tier you'd be done by January?

MR. HULSE: Yes, so what we are trying to do is we are trying to get the first two tiers reviewed and produced by the end of the first week of January. And, again, I want to reiterate, there has been substantial e-mail production. It was the product of predictive coding in the first instance, and we ran agreed key words per agreement with the plaintiffs' lawyers, so this is -- we've captured a lot of stuff.

MAGISTRATE JUDGE NOEL: Is it a fair evaluation to say that the predictive coding process that you have agreed

upon simply isn't working or is that an overstatement?

MR. HULSE: It's only overstated in this regard, Judge Noel, that the threshold ranking that I mentioned that comes out of this that we have allows us to identify the documents that are most likely to be relevant, and so that is very useful for us. It allows us to prioritize and focus on the documents that have the highest probability to be relevant.

THE COURT: Same question for you, Mr. Parekh.

MR. PAREKH: I think the system isn't working for a couple of different reasons. One is that the system that they're using for predictive coding Clearwell is essentially outdated at this point in terms of current technology versus the system that we would be using internally to do our review of these documents.

THE COURT: What system is that?

MR. PAREKH: It's a system called "Relativity," but we would also be using a system called "Catalyst" on the back end to do some of the predictive coding, which allows you as you review documents to in real time have the system learn, and it's called "Continuous Learning." That's the system that works much, much better than the Clearwell system that 3M insisted they wanted to use.

Number two, the relevance criteria, we had no input into in terms of the total way it was defined. We

were allowed under the protocol, despite our initial suggestion that we collaboratively both of us in a same room work to define what is a relevant and nonrelevant document. 3M refused to do that, and said we agree to a set of quality control criteria.

At the last status conference, in order to expedite this process, plaintiffs waived all of their protections. All of the quality control criteria that we had painfully negotiated, we agreed to give up so that we could get this process done faster, and yet we're still here today. We bent over backwards to do what we can to get this to work, and we've been stymied at every point. And we just think at this point they need to do what they were going to do, which is turn over the documents that their system has marked as being relevant, and let us deal with that. And then we can come back to the Court once we see those and say this is how much additional time we need based upon what we're finding.

MR. HULSE: What predictive coding has never meant in any case that I've ever seen is that once you hit the recall criteria, you turn everything over, Maybe minus privilege. That's not what it means.

What it means is it's a methodology that can be more or less successful for identifying, for getting more quickly to the set of documents that are then going to be

reviewed for relevance. That's the process.

THE COURT: So, Mr. Hulse, do you need more time or not, if you are going to do it your way?

MR. HULSE: If we do it our way, we do not need more time, Your Honor.

MR. PAREKH: But, Your Honor, their way leaves 80 percent of the documents that the system has marked relevant out of the equation.

MR. HULSE: It would not. It would simply use another methodology, which is keywords, which is what we've all used up until the error of predictive coding, to cut through that mass of irrelevant documents and hone in on the relevant ones.

MR. PAREKH: Which would result in a negotiation on keywords that would again take a period of time.

THE COURT: What about the information that the plaintiffs have gotten so far? What themes have emerged from that discovery? What do you see in that?

MR. HULSE: What themes?

THE COURT: From the plaintiffs' point of view.

MR. HULSE: I would be hard pressed to articulate their themes. I could try.

THE COURT: No, I'm asking them.

MR. PAREKH: I'm probably not the best person to answer it, but I will give it a shot. The themes that we're

seeing are primarily the fact that 3M put their head in the sand and intentionally chose not to do testing on the Bair Hugger system in terms of error and contamination, despite the fact that there were things that were brought to the attention of 3M on that process.

THE COURT: Okay, so what you've seen is information that was transmitted to 3M that you allege should have alerted them that there was a potential problem?

MR. PAREKH: Right, in fact the model --

THE COURT: So you have those things? Or you have some of those?

MR. PAREKH: We have some. We don't, I mean we obviously don't have everything, but we've seen some of that. One of the things that we recently found on the production that was actually just produced a couple of weeks ago was the label for the Bair Hugger 500, one of the older ones, and that label specifically states on it, "please don't use this over a wound site because there is the possibility of airborne contamination." That warning did not make it to any of the subsequent devices.

So, I mean, yes, we found things where it shows that 3M had knowledge of the possibility of airborne contamination as we've been saying from day one, and they either didn't do it or took it off or took steps to hide it.

We also have a lot of stuff that we've seen where

any time anyone criticized the Bair Hugger system in any way, 3M aggressively went through and tried to attack them both personally and professionally. And they had an entire team that's entire job was let's take anything that possibly discredits the Bair Hugger and do whatever we can to stop it including Dear Doctor letters and other things like that. Those are the themes that we're seeing underlying the --

MR. HULSE: I think what I was referring to is us responding to Dr. Augustine, but --

THE COURT: So, no, I just was asking if there were themes that had emerged for the purpose of asking a followup question, which is does the information that the plaintiffs have received so far give you an idea of how you might be more specific in what you're asking for?

Can you go deeper on some of the warnings or the complaints or the attack, the complainer, are you following up in that way?

MR. PAREKH: Yes, absolutely.

THE COURT: Okay.

MR. PAREKH: And we've been doing that in depos, but we've also been what one of the things that we would be doing if we get them to turn over the documents to us is using the documents that we've currently identified as being hot or, you know, important to the case and using that to then use predictive coding to evaluate those additional

documents that would be produced to us and rank them and review them that way as well, which is also one of the reasons why we think that, you know, having 3M turn over the 80 percent criteria documents makes sense. Let us do the work to figure out what's good and what's not because they can't.

MR. HULSE: It would be remarkable if this process, which they insisted on and then did not work as well as they like, that because it did not work as well as they'd like --

THE COURT: Yeah, we're not listening.

MR. HULSE: I'm sorry, Your Honor. I couldn't help myself.

MAGISTRATE JUDGE NOEL: And I apologize for not listening. It was my fault that I engaged Judge Ericksen in a private conversation.

MR. HULSE: You're entitled not to listen, Your Honors.

THE COURT: Is there anything on the depositions to discuss? Enough on this predictive coding business for the moment.

MR. CIRESI: Good morning, Your Honors.

THE COURT: Good morning.

MR. CIRESI: As one of the individuals who has taken many of the depositions, and Your Honor asked would

they need more time? I think there has been some discussions among those who are dealing with this issue about extending some of the discovery deadlines, but let me just give one example.

I think it's 10 days after the documents have to be produced, we need to submit expert reports. Documents are critical in this case. I know that from taking the depositions. They are suggesting that, and I'm not going to get into the granularity of what they've been discussing, but I think it's impossible for the plaintiffs to take the types of depositions that need to be taken without a robust production of documents.

THE COURT: So that would be the ones that are scheduled that are listed here the --

MR. CIRESI: Your Honor, yes, none of the ones listed. I have one coming up Monday, the ones we've taken, I mean I've taken the director of R&D.

THE COURT: Is that Michelle Holt Stevens?

MR. CIRESI: Stevens, yes, that's Monday, Your Honor. And I don't have the whole schedule in front of me right now, but that is one. I have another one in January, but what's being suggested here is that at least two times the amount of documents that have already been produced are going to be produced. I have no idea as I stand here today, and I don't think anybody does, how relevant and critical

some of those documents may be to the depositions that we've already taken, let alone that we need to take.

So we have to get all of these documents, review them, and then use them in the depositions. And there is a list here of the depositions. And I believe, Your Honor, it's on the joint agenda and report for this conference on page 11. So that shows the ones that have been completed and the ones that are still noticed. And we have some 30(b)(6) that we haven't yet noticed so, and that would depend upon what documents we see.

I say this because I know there's been some discussion about extending the deadlines, and everybody has got schedules, and I know the Court has an extremely heavy schedule in this district. So I'm just forewarning that we're probably going to request an extension. We're going to have to. And if the defense wasn't want to admit that, I'm going to tell you that that might be necessary.

We're working as diligently and as hard as we can to comply with the discovery orders that exist today, but to suggest that you're going to come in with double the documents and then we have to get to our experts, evaluate them, let them evaluate them, and get it to them within 10 days after the production comes in, it's impossible, let alone to take the depositions, which the experts would also need to compile their reports. So I don't know how this

addresses the granularity of what the protocol should be.

THE COURT: No, we're done talking about that.

MR. CIRESI: Yeah, but we need to find some rational way that we can get these documents and that we have a workable schedule that gives us an ability to take the depositions that need to be done. And for that matter, for the defense to be able to ask whatever questions they have to to get this prepared without prejudice to either party.

THE COURT: Okay, thank you.

MR. HULSE: Your Honors, there has not been any discussion that I'm aware of between lead counsel about what a discovery extension would be. From my role, what I can speak to is that just simply that we have a plan to get the documents produced within the current schedule, and that our viewpoint is that to the extent that plaintiffs view that they need more time for particular things, whether it's specific depositions or re-depositions and so forth, then they should make the case for that.

Certainly, however, from our perspective, it is preferable to have an extension of discovery than a procedure, which would infringe on our rights under Rule 26 not to have to turn over nonrelevant and privileged documents to the other side.

THE COURT: Okay. Well, I think we're going to go

confer here momentarily, but while I have you, you said with respect to Dr. McGovern that the dates that were given within the current schedule were these first week of January dates.

MR. HULSE: Right, Your Honor.

THE COURT: Were there dates that were later in which the doctor would be available, but they just weren't before January 20th?

MR. HULSE: We do not. We haven't discussed later dates with Dr. McGovern's counsel, so I couldn't speak to that.

MR. GORDON: Your Honor, they've addressed that --

MR. CIRESI: I believe, Your Honor, on the joint agenda report that's submitted at page 4, it says that it might be more problematical to find available consecutive dates later in January, so I don't think it's been fully explored with respect to whether those dates are or are not available.

MR. HULSE: It might be more problematical, our British solicitor informs us.

THE COURT: I know, I lived there for two years. I know what that means.

MR. HULSE: We have revisited it with them, with Dr. McGovern's counsel, Your Honor, and they've said that's it for January. And we have not explored later months.

THE COURT: Well, I suppose the reason Dr. McGovern is available those days might be the same reason that at least some, I mean I'm sure the whole plaintiffs' team isn't taking the week off.

MR. HULSE: It has to do with the academic calendar, I believe actually, Your Honor.

THE COURT: Oh, does it?

MR. HULSE: Yes.

THE COURT: But they have those short -- then they must have another break at the end of February or something.

MR. HULSE: I admit it's a bit arcane to me but.

THE COURT: Michaelmas and --

MR. HULSE: Michaelmas, yes.

MR. ASSAAD: Your Honor, on the e-mail from Dr. McGovern's solicitor, those were the only two dates available, if they want to do two days of depositions back to back. He did indicate that they had days available for one day for deposition in January, and I don't think his deposition needs two days. I think one day would be plenty of time that we'll agree to as to when, and now after they cancelled another one --

THE COURT: Yeah, we understand how they cancelled. I mean the guy is sick. You're not questioning that he's sick.

MR. ASSAAD: Yes, I understand that --

MR. HULSE: Well, they did question it, Your Honor, and he's in the hospital.

THE COURT: Okay. We'll take a 10-minute recess.

(Morning Recess at 10:35 a.m.)

(10:49 a.m.)

(In open court)

THE COURT: Go ahead and be seated, thank you.

We've heard plenty, I think, this morning, and you need a decision like now so here it is.

MAGISTRATE JUDGE NOEL: And with that introduction, so on the first issue, which is this predictive coding thing, we've concluded that the defendant's proposal to, as I understand it, essentially do a traditional ESI search of the relevant universe of documents and produce what you come up with is what should happen, and you should go forth and do that as quickly and as efficiently as you can within the current schedule.

Then it appears that there will also be some need to adjust dates in the schedule to allow all of the discovery that needs to be done to be completed. And for that, we're going to order that each side submit to us a proposed amended scheduling order. And you should get those competing proposals to us by the first of January.

As to the deposition of Dr. McGovern, we are of a mind that it should remain on the dates that it is currently

scheduled and that the plaintiffs should be permitted to participate by video conference, if that's what they choose to do as opposed to sending a lawyer to the United Kingdom for a third time.

And then once we get your competing proposals as to what the amended scheduling order should look like, we will issue an amended scheduling order that will either pick one or the other. And I guess we're not eliminating, which sometimes I will do, the potential to pick and choose and/or cut and paste. But bear in mind as you're preparing your proposed competing schedules, that we may well just pick one or the other, so you want to make yours the most reasonable and most likely for the Court to pick.

THE COURT: I think that's everything.

MR. GORDON: One housekeeping question, Your Honor, if I may. I noticed that January 1st is a Sunday, and I maybe will just throw this out there without having conferred yet. I wonder whether I mean you said no later, then maybe we could do it before January 1st, given a couple of dates that occur in December, I wonder if we should talk about something a little sooner perhaps.

MR. HULSE: I think that makes sense from our perspective, Your Honor.

THE COURT: Okay. Mr. Gordon, pick a date.

MAGISTRATE JUDGE NOEL: If you want to agree on an

earlier date, agree on whatever date you want to agree to, but we want it by the first of January. And if it is in fact a Sunday, what that means is whatever Rule 6 or whatever the rule is that tells you how to count days, I think it would be the next day that's not a Saturday, Sunday or holiday, which I believe would be Tuesday the 3rd, because I believe the 2nd is the day we celebrate if the 1st is a Sunday. But if you want to agree to an earlier date, we'll be happy to receive it on whatever day you agree upon.

MR. HULSE: We'll confer with Mr. Gordon and his co-counsel.

MR. GORDON: Thank you, Your Honor.

THE COURT: All right.

MAGISTRATE JUDGE NOEL: Anything else?

MR. HULSE: No, Your Honors.

MR. CIRESI: Nothing, Your Honor.

THE COURT: All right. Thank you all very much.

(Court adjourned at 10:53 a.m.)

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REPORTER'S CERTIFICATE

I, Maria V. Weinbeck, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: *s/ Maria V. Weinbeck*

Maria V. Weinbeck, RMR-FCRR